IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-777

UNITED STATES OF AMERICA,

Petitioner,

v.

KEITH CREWS,

Respondent.

ON WRIT OF CERTIORARI TO THE
DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF FOR THE RESPONDENT

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

QUESTION PRESENTED 1

COUNTER STATEMENT 1

SUMMARY OF THE ARGUMENT 9

ARGUMENT:

I. THE COURT OF APPEALS' DECISION DID NOT INVOLVE THE APPLICATION OF A "RETROACTIVE TAINT" TO EVIDENCE LAWFULLY OBTAINED BY THE POLICE PRIOR TO THEIR MISCONDUCT 16

II. THE SUPPRESSION OF OWENS' IN-COURT IDENTIFICATION IS NECESSARY TO DETER THE KIND OF BAD FAITH AND PURPOSEFUL POLICE MISCONDUCT THAT OCCURRED IN THIS CASE; MOREOVER THAT IDENTIFICATION WAS AN UNATTENUATED FRUIT OF THAT MISCONDUCT 33

A. Deterrence 33

B. Attenuation 42

Temporal Proximity 45

Intervening Events 45

Free Will of the Witness 49

The Character of the Fourth Amendment Violation 50

III. THIS COURT SHOULD NOT CARVE OUT AN EXCEPTION TO THE COVERAGE OF THE FOURTH AMENDMENT EXCLUSIONARY RULE FOR THE TESTIMONY OF THE VICTIM OF A CRIME 56

CONCLUSION 60

TABLE OF AUTHORITIES

Cases:

Bond v. United States, 310 A.2d 221 (1973) 55
Brown v. Illinois, 422 U.S. 590 (1975) ..... *passim*
Bynum v. United States, 262 F.2d 465 (D.C. Cir. 1958) 6,25
Coolidge v. New Hampshire, 403 U.S. 443 (1971) 23
Davis v. Mississippi, 394 U.S. 721 (1969) 6,24,25,28
Douglas v. United States, 386 A.2d 289 (1978) 21
Dunaway v. New York, ____ U.S. ____ (1979) 29,37
Elkins v. United States, 364 U.S. 206 (1960) 9
Frisbie v. Collins, 342 U.S. 519 (1952) 27,28,30,31
Gilbert v. California, 388 U.S. 263 (1967) 40
Johnson v. Louisiana, 406 U.S. 356 (1972) 46
Ker v. Illinois, 119 U.S. 436 (1886) 27,28,30
Manson v. Brathwaite, 432 U.S. 98 (1977) 28
Olmstead v. United States, 277 U.S. 438 (1928) 59
Oregon v. Hass, 420 U.S. 714 (1975) 57
Payne v. United States, 294 F.2d 723 (D.C. Cir. 1961) 55
Scott v. United States, 436 U.S. 128 (1978) 41
Stone v. Powell, 428 U.S. 465 (1976) 28,41
United States v. Calandra, 414 U.S. 338 (1974) 36,57
United States v. Ceccolini, 435 U.S. 268 (1978) ..... *passim*
United States v. Cunningham, 391 A.2d 1360 (1978) 21
United States v. Edmons, 432 F.2d 577 (2d Cir. 1970) 6,36,57
United States v. Janis, 428 U.S. 433 (1976) 41,57
United States v. Reid, 527 F.2d 380 (2d Cir. 1975) 55

United States v. Wade, 388 U.S. 218 (1967) 28,29,38,48
Walder v. United States, 347 U.S. 62 (1954) 39
Wong Sun v. United States, 371 U.S. 471 (1963) 43

Miscellaneous:

D.C. Code §31-201 (1973) 4

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BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

Whether the Court of Appeals was correct in excluding identification evidence which was the fruit of a purposeful and bad faith Fourth Amendment violation designed to obtain precisely that evidence.

COUNTER STATEMENT

Respondent, then sixteen years of age, was indicted for two separate armed robberies, one allegedly occur-

ring on January 3, 1974, and the other on January 6, 1974, and both allegedly taking place in the vicinity of the Washington Monument. On April 22, 1974, the cases were tried jointly before a jury.

At the conclusion of the trial, respondent was found not guilty of all charges stemming from the January 6 robbery,[1] and guilty of the armed robbery of Ms. Carol Owens, the complaining witness in the January 3 robbery.

On appeal from that conviction, a panel of the District of Columbia Court of Appeals, over a dissent, affirmed respondent's conviction. (Gov. App. C). The Court of Appeals then considered the case *en banc*, and, with seven judges joining the majority opinion, reversed. (Gov. App. A).

1. Prior to trial, a hearing was held on respondent's "Motion to Suppress Identification." Respondent alleged in that motion that he had been illegally arrested and that all fruits from that arrest, including testimonial evidence concerning any identifications,

[1]The government's theory was that the respondent committed both robberies in the Washington Monument area, one on January 3, 1974 and one on January 6, 1974. Ms. Carol Owens, however, the victim of the first robbery, described her assailant as clean shaven. Ms. Sandra Denner, one of the complaining witnesses in the January 6 incident, recalled her assailant as having a moustache. She was never able to identify respondent as her assailant.

Respondent took the stand and denied his involvement in both incidents. A friend of his, Mr. Philip A. Smith, testified that on January 6, 1974, he had been with the respondent at a movie theatre at the time when the robbery allegedly took place. Respondent testified that on January 3, 1974, at the time the first robbery allegedly occurred, he was participating in a pick-up basketball game.

should be suppressed.

At the hearing, Officer David Rayfield, a member of the United States Park Police, testified that on January 9, 1974, at approximately 12:10 p.m., while working in the Washington Monument area, he noticed a Negro male approximately three hundred feet from the concession stand near which the officer was standing. Officer Rayfield testified that he and his partner were aware of robberies in the Washington Monument area on January 3 and again on January 6, and aware that the alleged perpetrator had reportedly been described as a Negro male, 15 to 18, with a slender build and light complexion. Tr. at 49.[2]

Officer Rayfield was "suspicious" of the Negro male (respondent) he observed on January 9 because "he matched the description to some degree of the person" allegedly involved in the robberies. Tr. at 52. His "suspicion" was "enforced [sic]" after he learned from a tour guide that he thought that respondent looked like a person who had been around the Washington Monument at some time on January 3. Tr. at 64.[3]

[2]The pagination in the transcript runs consecutively from the first day of the hearing on the Motion of Suppress to the conclusion of the trial.

[3]The government incorrectly states that at trial the tour guide, Mr. James Dickens, positively identified respondent as having been near the Monument on January 3. Brief for the United States Government (hereinafter, Brief), at p.4, n.2. In fact, he said he "thought" respondent was the same person and he was "almost" positive. The trial testimony to which the government refers reveals Mr. Dickens, who was not a witness to the January 3 robbery and is blind in one eye, to have been a less than compelling witness. He testified that the person he saw on January 3 resembled a man he knew who was well over 7 feet 10 inches tall. Looking at respondent in the courtroom, he estimated him to be "pretty close to 5 feet." Tr. at 125-130.

Solely on the basis of that information, the police officers placed respondent under arrest as a suspected truant.[4] They then notified Detective Carl Ore, the Metropolitan Police officer investigating the two robberies, of the arrest. Tr. at 53. Respondent was detained by the two Park Police officers for ten to fifteen minutes, awaiting Detective Ore's arrival. Once Detective Ore arrived, an attempt was made to photograph the respondent. *Id.* Officer Rayfield testified that this was done because it is the customary procedure for arrested truants.

Detective Ore testified that at approximately 11:30 a.m., on January 9, 1974, he received a call from two Park Police officers relating that they had "contacted a man . . . [who] resembled the description that was given in a robbery lookout." Tr. at 59. Detective Ore drove to Fourteenth and Madison Streets where the suspect, respondent, had been arrested. Contrary to Officer Rayfield's explanation, Detective Ore stated that he attempted to photograph the respondent to obtain pictures "to show . . . to the complaining witnesses" in the two robbery incidents. *Id.* Because of the rain he was unable to "interview" or "photograph" the respondent and Detective Ore therefore ordered the arresting officers to take him to Park Police headquarters "for interrogation and processing." *Id.* All tolled, respondent was kept at headquarters for approximately one hour. At the station, he was searched, fingerprinted and photographed. Tr. at 60. While

[4] In the District of Columbia, children 15 years and younger are required to attend school. D.C. Code §31-201 (1973). Respondent accurately told the police that he was 16 and that he had been in school earlier that day.

respondent was under arrest, the police called his school to ascertain his whereabouts on January 3 and 6, the dates of the robberies. They made no effort to determine whether he was a truant on January 9, the day of the illegal arrest. Respondent was never formally charged with truancy.

Detective Ore testified that the pictures taken at the Park Police headquarters were eventually displayed to Ms. Carol Owens, the complaining witness in the first robbery, and she identified the respondent as the person who had taken ten dollars from her on January 3. Tr. at 62.[5] Based on that identification, respondent was once again arrested and charged with armed robbery. Thereafter the complainant went to a lineup and again identified respondent as the person who had robbed her on January 3. Tr. at 62.

At the conclusion of the suppression hearing, the trial court found that the lengthy detention of respondent at Park Police headquarters constituted an arrest and was illegal because there was no probable cause. The trial court's finding was a clear rejection of the arresting officer's testimony that he had arrested respondent for truancy and not as a robbery suspect and constituted a finding that the sole purpose of the arrest was to obtain respondent's photograph in order to generate identification evidence. The court further ruled that the photographic and lineup identifications were fruits of the illegal arrest and thus inadmissible. The court determined, however, that the government

[5] The pictures were also shown to the complaining witnesses in the January 6 robbery, one of whom identified respondent and one who identified both respondent's picture and a second picture as possible suspects.

would be permitted to introduce testimonial evidence of an in-court identification of the respondent by the witness. That in-court identification was the sum total of the evidence linking respondent to the crime.

2. A panel of the District of Columbia Court of Appeals affirmed over a dissent. The majority agreed that the illegal arrest was a "significant invasion of [respondent's] constitutionally protected interests" (Gov. App. 75a), and would not "approve . . . the officer's investigatory tactics" (Gov. App. 79a), but determined that the in-court identification was not a fruit of the police misconduct. Judge Fickling, in dissent, found that the arrest was "made in bad faith, without probable cause . . . for the purpose of obtaining identification evidence. . . ." (Gov. App. 86a). He therefore concluded that the deterrent rationale of the exclusionary rule compelled exclusion of all fruits of the illegality, including any testimony concerning an in-court identification:

> Here, the illegal arrest of [respondent] for the sole purpose of obtaining and exhibiting his photograph to the robbery victims, with a view toward having any resulting identification duplicated at trial, is clearly an exploitation of the "primary illegality." *United States v. Edmons, supra. See also Davis v. Mississippi*, 394 U.S. 721 (1969); *Bynum v. United States*, 107 U.S. App. D.C. 108, 274 F.2d 767 (1960). Such an illegal arrest made for the precise purpose of securing identifications that otherwise would not have been obtained epitomizes, in my view, the evils sought to be prevented by the exclusionary rule. *Id.*

The Court of Appeals *en banc* reversed with seven judges joining the majority opinion. Noting that the

government was not contending otherwise, the Court accepted the trial court's finding that respondent was arrested without probable cause:

> [T]he trial judge's conclusion was correct on the facts. Keith Crews' presence at the scene of the robberies, his minimal resemblance to the quite general description of the assailant, and his weak, very tenuous identification by tour guide Dickens, did not constitute probable cause to believe that he had participated in the robberies and assaults. (Gov. App. 19a)

The Court then concluded that the prospective fruit that respondent wanted suppressed, an in-court identification by complainant Owens, was causally connected to the illegal arrest:

> [T]he unlawful arrest produced photographs which were shown to the complaining witnesses who, as a result, identified [respondent]; this resulted in his reapprehension, which yielded a court-ordered line-up identification, and, eventually, in-court identification testimony during prosecution of the case. (Gov. App. 20a-21a.)

The Court then turned its attention to whether the government had shown the fruit to be attenuated from the illegality. Relying on *Brown v. Illinois*, 422 U.S. 590 (1975), and *United States v. Ceccolini*, 435 U.S. 268 (1978), for guidance, the Court correctly observed that "the character of the official impropriety is the most germane of the attenuating variables." Gov. App. 45a. Examining the facts before it, the Court found that the misconduct was purposeful and that the police acted in bad faith because they knew they did not have probable cause to arrest:

[Respondent] Crews was intentionally subjected to an investigatory arrest for the very purpose of obtaining identification evidence. . . . The remarkable parallels to the offending police activity in *Brown v. Illinois, supra*, are noteworthy. In that case, as this,

> [t]he impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their action was "for investigation" or for "questioning". . . . The detectives embarked upon this expedition for evidence in the hope that something might turn up. (Gov. App. 48a).

Given the clear, investigative purpose of the arrest and the demonstrated bad faith of the officers in making an arrest when they knew they had no basis for it, and the failure of the government to show that the fruit was attenuated from the illegality, the Court of Appeals concluded that the deterrent purpose underlying the exclusionary rule required that the in-court identification be suppressed:

> We believe that fidelity to the Constitution mandates our disapproval of the official misconduct which was designed to lead—and did lead—to the identification evidence in this case. We reject the notion that mere suppression of the photographic and lineup identification testimony, but not the in-court identification, would somehow be an adequate deterrent sanction in this case. This conclusion could only result from the untenable assumption that a sufficient disincentive results when the police are prohibited from enjoying some, but not all, of the products of their wrong.[6] (Gov. App. 52a).

The two dissenting judges agreed that "there is no question but there . . . was no probable cause for [respondent's] seizure [and] [t]hus his Fourth Amendment rights were violated." (Gov. App. 58a.) They also agreed that the out-of-court identification should be suppressed as fruits of the misconduct. They disagreed with the majority only with respect to the admissibility of the in-court identification.

SUMMARY OF THE ARGUMENT

In the early afternoon of January 9, 1974, U.S. Park Police officers investigating two robberies that had occurred several days before on the Washington Monument grounds came upon the respondent in that general area. Although they knew that they lacked probable cause to arrest the respondent,[7] they did so anyway for

[6] The Court also noted that its decision was in harmony with the "imperative of judicial integrity" that the Court referred to in *Elkins* v. *United States*, 364 U.S. 206, 222 (1960):

> We therefore rely secondarily upon the preservation of the integrity of our judicial system in ordering suppression of the courtroom identification of appellant. We accept judicial integrity as a still vital supplementary rationale whose cogency is closely related to that of deterrence in a given case. (Gov. App. 54a, n.39)

[7] Many of the arguments which the government makes in its brief are premised on its assumption that the officers here were not acting "in willful disregard of their lawful authority." Brief at 52. This premise is belied by the facts, and the Court of Appeals unquestionably found that the officers were acting in bad faith. Such a finding is implicit in the trial court's ruling as well. While the government ignores this finding in its analysis, respondent does not understand the government to be challenging it.

the specific purpose of taking his picture to show to the victims. He was transported to police headquarters, searched, fingerprinted and photographed and, about an hour after his arrest, released. Some days later, police displayed the photograph to two of the victims, and both identified the respondent as their assailant. Solely on the basis of that identification, the respondent was arrested again. He was ordered to stand in a lineup and again he was identified. On this evidence, the respondent was indicted and brought to trial.

Before trial, the respondent moved to suppress the identification of him by the victims, arguing that all such identification evidence was the fruit of his earlier, illegal arrest. The trial court agreed that the arrest was illegal and accordingly ordered the out-of-court identifications suppressed, but it permitted the government's witnesses to attempt to identify respondent in court. On the basis of an in-court identification by Owens, the respondent was convicted of one count of armed robbery. He was acquitted of the other.

In a carefully reasoned opinion, the Court of Appeals, sitting *en banc*, analyzed the case, as this Court's opinions teach, from the standpoint of deterrence, and applied traditional "fruit of the poisonous tree" principles to the challenged evidence. It concluded that the in-court identification was a final link in a causal chain that began with the respondant's illegal arrest: an arrest which the Court found to have been made in bad faith and for the intended purpose of acquiring precisely the evidence which the respondent challenged in his motion to suppress. The Court then went on to consider whether any factors broke this causal chain, and found that the government had failed

to show the existence of any source for the challenged evidence which was independent of the initial illegality. Indeed, as the Court pointed out, the government never proffered any legally acquired evidence whatever. The Court also found that the government had failed to show any attenuation in the nexus between the in-court identification and the respondent's initial arrest. The Court concluded that it is in just such a case as this—where the challenged evidence was the direct and intended consequence of purposeful, bad faith police misconduct—that the exclusion sanction is most clearly mandated, for it is in just such a case that the police are most deterrable, and deterrence is most imperative.

The Court of Appeals was surely correct. Its analysis and its conclusions are clear and unimpeachable. This is doubtless why the government, in its brief, refuses to confront that opinion on its own terms. Instead, it argues that while the Court of Appeals' analysis may seem straightforward and conventional, really it is not; for unbeknownst to that Court, it was adopting a perverse and implausible theory that lawfully obtained evidence may become tainted, *i.e.*, become a suppressible fruit, by virtue of subsequent police misconduct. The government then goes on to devote the bulk of its brief to an attack on that theory, which it terms the theory of "retroactive taint," arguing at length that it generates results which are inconsistent with prior decisions of this Court, at odds with the deterrent policy that underlies the exclusionary rule, and unbounded by limitations of traditional attenuation analysis.

What the government does, then, is to spin out its own theory of "retroactive taint," ascribe it to the

Court of Appeals, and then urge this Court to reverse the Court of Appeals on the basis that evidence which is tainted only retroactively should never be suppressed. Only then does the government go on to address itself to the Court of Appeals' decision in this particular case, arguing that the result reached is itself an example of the counterproductive application of the "retroactive taint" theory, reversible even under a conventional attenuation analysis.

The government's attack, then, is primarily from the flank. Its success requires it to show that the result reached by the Court of Appeals really does rest on a theory that lawfully obtained evidence may be "tainted" by subsequent police misconduct, and that here it was precisely such evidence that the Court of Appeals did suppress.

This argument is confronted with a substantial obstacle. The Court of Appeals clearly did not think that it was adopting any new theory at all, but, rather, that it was applying standard "fruit of the poisonous tree" principles in a perfectly straightforward way. Moreover, the opinion seems to be no more–or less–than a reasoned application of those principles to reach a manifestly correct conclusion. Since there is nothing askew with the legal analysis, the government suggests that there is a quirk in the facts of this case that led the Court of Appeals astray. But as respondent will show in Part I of his brief, it is only the government's perverse and untenable way of characterizing the facts, and nothing inherent in the facts themselves, that is peculiar here. Respondent will show, in other words, that the Court of Appeals' decision is just what it appears to be–the carefully reasoned result of the

correct and meaningful application of traditional "fruit of the poisonous tree" principles to a perfectly conventional set of facts[8] that cry out for the exclusionary rule's application–and that the government's argument, which is centered around a notion that this case involves the application of the "retroactive taint" theory, is baseless.

That argument, in the government's bizarre language that would do a medieval scholastic proud, goes like this: (1) the "evidence" which was suppressed here was not, as it would seem, Owens' in-court identification of the respondent, but rather, her "ability to identify" the respondent as her assailant; (2) the police "knew" that she had this "inchoate ability" before they illegally arrested the respondent. Because they "knew" she had this "inchoate ability," and because "inchoate ability" is evidence, they had "obtained" that "evidence" prior to the arrest; therefore, (3) that lawfully obtained evidence was suppressed on the theory that it was "retroactively tainted" by the later misconduct. While the misconduct may, admittedly, have served to impart "prosecutive utility" to that "evidence," this kind of nexus to the evidence is not susceptible to analysis under traditional fruits principles and is an inappropriate nexus on which to base the exclusionary sanction.

As respondent will show, the government's first premise–that what was suppressed was "Owens' ability to make an identification"–rests on a distortion of the opinion of the Court of Appeals. In fact, the evidence

[8] The only thing unusual about the facts is that they so clearly demonstrated the bad faith and flagrancy of the misconduct when the police arrested respondent knowing they lacked probable cause.

suppressed here was an in-court identification that manifestly followed, and was generated by, the illegal arrest. Respondent will show that the government's second premise–that the "inchoate ability" to make such an identification was "evidence" which had been "obtained" by the police before the police misconduct occurred–is a perverse and useless way to describe the facts of this case. Indeed, if the facts are described in this way, then all fruits issues are transmuted into ones involving an alleged retroactive taint.

Moreover, the elaborate terminology and array of metaphysical constructs which the government deploys here in its prodigious effort to distort this case into one that seems to involve a "retroactive taint," needlessly confound and confuse the correct analysis of fruits issues. For if an "ability to testify" is the same as testimony, and if even "inchoate abilities" constitute "evidence," then the link between official misconduct and the challenged evidence will always involve imparting "prosecutive utility" to that evidence in some way. And, of course, all Fourth Amendment exclusionary rule cases involve the issue of whether the suppression sanction should be applied to deprive the government of the "prosecutive utility" of the evidence challenged as a fruit of official misconduct. Now, courts resolve that fruits issue by applying conventional attenuation and independent source principles to determine whether the challenged evidence is connected to the official misconduct in such a way that the suppression sanction of the exclusionary rule is both appropriate and likely to be efficacious. The government's new vocabulary would require courts to apply the exact same analysis, though the causal nexus would be discussed in terms of the illegality and the "prosecutive utility" of the challenged evidence. For facts are stubborn things; they

do not change simply because they are described differently, nor does the purpose of the fruits inquiry. The government's queer terminology simply makes that inquiry more abstruse and recondite.

The correct resolution of this case is so clear, however, that even the government's nomenclature can not obscure it. After all, an effort to transform the witness' "inchoate ability" into actual evidence with "prosecutive utility" is what the misconduct here was all about. When the police arrested the respondent, they had virtually no evidence against him; that, of course, is what made the arrest illegal in the first place. It was precisely because they hoped to develop evidence with "prosecutive utility" that they went ahead and made the investigative arrest anyway. That bad faith arrest without probable cause generated precisely the identification evidence which the officers were seeking when they made it. The purpose of the illegal arrest was to obtain the very identification evidence which respondent challenged as its its fruit, and without that illegal arrest the government would have had no evidence at all. As the Court of Appeals convincingly explained, the deterrent purpose that underlies the exclusionary rule manifestly requires its application where, as here, the challenged evidence was the intended fruit of the police misconduct. This is so no matter how the facts are described.

It is only in the deep recesses of its brief, that the government takes on the Court of Appeals decision on that Court's own, perfectly straightforward terms. As respondent will show in Part II of this brief, the battle is a rout–and not, as the government would have it, because the Court of Appeals did not fight fair by finding a "retroactive taint." Rather, as respondent will show, it is because the deterrent rationale which

underlies the exclusionary rule so clearly compels its application to the in-court identification here and because perfectly conventional fruit of the poisonous tree principles so clearly demonstrate that this identification was an unattenuated fruit of the police misconduct.

Finally, in Part III, respondent will show that a *per se* exception to the exclusionary sanction for eyewitness testimony of the victims of crimes, would be arbitrary, unprincipled, and fundamentally different from any of the limitations on the reach of the exclusionary sanction which this Court has ever before announced.

I.

THE COURT OF APPEALS' DECISION DID NOT INVOLVE THE APPLICATION OF A "RETROACTIVE TAINT" TO EVIDENCE LAWFULLY OBTAINED BY THE POLICE PRIOR TO THEIR MISCONDUCT.

Undoubtedly because it cannot prevail through straightforward application of "fruit of the poisonous tree" analysis, the government resorts to a new metaphorical doctrine of its own creation, "retroactive taint," which, it claims, the Court of Appeals itself unwittingly adopted. In fact, however, this case was decided on no such theory, and neither the reasoning nor the holding of the Court of Appeals suggests that it was. Indeed, the government's "basic submission" here—that this case involves the suppression of lawfully obtained evidence only "retroactively tainted" by subsequent police misconduct—is but an elaborate straw man. Whatever the actual implications of the phrase "retroactive taint," and whatever the wisdom of suppressing previously acquired evidence on account of

subsequent police misconduct, this case simply involves no such issue.

The government's effort to depict this as other than a garden variety fruit case begins with the assertion that the evidence challenged here is "Owens' *ability to identify* respondent as her assailant." Brief at 11 (emphasis supplied). From this premise it argues that since this latent ability was based on the complainant's "knowledge of the appearance of her assailant" and "was known to the police before any illegal act on their part," there necessarily could be no causal connection between the acquisition of the evidence and the police misconduct.[9]

[9]The government could as well be saying that a farmer "possesses" an apple because he owns a patch of land which may or may not be fertile. This can be said, of course, but it is certainly a strange use of the word "possess". We can even go on to say that if the farmer then buys seed, plants it, and harvests the apples, they are not the fruits of his labor because his actions only imparted "agricultural utility" to the land which proved to have an "inchoate capacity" to bear fruit. We can describe the facts in this way, but whether it is helpful to do so depends on our objective. If we are a potential buyer of the farmer's apples, and we want to deter him—and other farmers—from stealing seeds, then, much as we like apples, it may be an effective deterrent to refuse to buy those apples which are grown from stolen seeds. We should make our judgment about the likely effectiveness of this response in light of the farmer's actual connection to the growing of the apples, regardless of how that connection is described. What he has done is the same whether we say, straight out, that he stole the seeds and planted them, or, more obscurely, the he only imparted "agricultural utility" to the land. But if his connection is described in this peculiar way, then we have to ask another question, how did he impart that utility? When we then find out that he did it by stealing the seed and planting it, our response to it should be the same. And, of course, the actual effectiveness of our response, as a

(continued)

This faulty premise concerning the nature of the evidence suppressed becomes the springboard from which the government leaps to the conclusion that the only function that the respondent's illegal arrest served was to "giv[e] prosecutive utility to evidence already possessed by the police," Brief at 17, and hence to the further conclusion that

> [u]nder the view of the court of appeals, . . . any evidence linking the defendant to the offense is a potentially suppressible "fruit" of an illegal arrest or detention precisely because that action enabled the investigating officers to realize that the defendant is indeed the culprit. Brief at 18.

The government then exhibits a parade of horribles as purported examples of the intolerable results to which, it says, this "view" that it attributes to the Court of Appeals, would lead.[10] Brief at 22, 37-41.

(footnote continued from preceeding page)

deterrent, will not be changed one wit by the way we have described the facts. But if the farmer were to use this outlandish vocabulary to argue that it was inappropriate to exclude his apples from the market because he possessed apples in inchoate form before he even stole the seeds for them, and that thus there was no casual connection between his actions and the apples themselves, we would just laugh.

[10]Further along in its brief, the government goes on to suggest that the Court of Appeals cast aside, as excess baggage, the limiting doctrines of independent source and attenuation and embraced a "but for" test for causation; if, "but for" the illegality the evidence would not have been presented, then it should be suppressed:

> Under the court of appeals theory, the photograph [of the burglar in the government's hypothetical] and testimony about how and where it was descovered, could never be admitted at trial because its very presentation in evidence and its prosecutorial utility were "made available to the

(continued)

The premise for this argument, the government's "basic submission" here, Brief at 18, is, however, demonstrably unsound. Suppressed fruit in this case came into existence only after, not before, the illegality. Indeed, the lower court's analysis was the same as that employed by this Court and lower courts in numerous other cases.

As a threshhold matter, it is not easy to discern how "Owens' *ability* to identify the respondent as her assailant" is evidence at all. To be sure, Owens' anticipated testimony as to the circumstances of the offense and her opportunity to observe her assailant

(footnote continued from preceeding page)

> government through a process initiated by [an] unlawful act," Brief at 37.

Nothing could be further from the truth, and the government's ability to make the argument is dependent upon wrenching this single sentence out of the context. In fact, the quoted portion is not a conclusion reached by the Court of Appeals, but rather, a paraphrase of the respondent's averment of factual causation. The Court of Appeals made it unmistakably clear that even after such causation is found the issues of independent source and attenuation remain:

> An affirmative answer to the causation question, however, by no means ends the discussion about exploitation of the illegality. (Gov. App. 25a).

As the respondent will show in Part II-B of his brief, the Court did in fact go on to apply attenuation and independent source principles in a perfectly straightforward way. This is why the government's suggestion on page 41 of its brief that the logic of the Court of Appeals would lead it to suppress identification evidence flowing from identifications of photographs taken after unlawful arrests in other offenses, is patently absurd. It depends on the erroneous assumption that this is a "retroactive taint" case and that, as such, the test for exclusion must be one of "but for" causation.

constituted prospective evidence, but characterizing her "inchoate capacity" to make an identification is a much more problematic venture.[11] But however one describes

[11]In ordinary language, we may use the term "ability" as the verbal equivalent of a prediction about a person's future success at some endeavor: when we say that Elvin Hayes has the "ability" to hit an open jump shot, we mean to say that when he tries to do so, he will succeed a substantial portion of the time, basing this prediction on his past success at the same effort. It is difficult to find any similar meaning for "Owens' ability to identify respondent", particularly when it is considered from the relevant perspective, that of the police before they arrested the respondent. Certainly they could not safely predict that Owens would recognize him as the culprit, as little as they knew to connect him with the offense. Nor does it help things to rephrase the characterization of the challenged evidence, as the government unwittingly does at one point, (Brief at 11), and call it instead "Owens' ability to identify her assailant," whoever he might be. In the first place, could any prediction that she would succeed be anything but pure speculation, before she actually viewed any suspect? Unlike the basketball player, whose future performance, one hopes, can be predicted with some measure of accuracy from his past, Ownes had no past record from which to judge. Before she viewed respondent's photograph, the police, rather than possessing evidence, possessed at most hope.

In the second place, if this notion of "ability" implies the "ability" to identify the person who *in fact* assaulted her, rather than the mere ability to state with apparent sincerity that she recognizes a man, whether or not the person she is viewing is in fact the guilty one, then the existence of this "ability" is peculiarly self-verifying. The government now says that this ability exists and did so all along; but the evidence that Owens identified the right man comes only from the fact that she made an identification. Conversely, if the "ability" is the "ability to identify her assailant," does this mean that she could not be mistaken; that if she failed to identify a particular suspect he is, *per force*, innocent? What of the poor man about whom she is not sure? Moreover, to

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that "ability," it does not constitute evidence, and it is absurd to conclude that the police "possessed" it. The police could not be sure that Owens could identify anyone, let alone respondent; indeed, the witness herself could not know, until she viewed his likeness. If the police "possessed" this "evidence" in any meaningful sense, then, of course, the arrest here would not have been illegal in the first place.

Thus the government's premise, that the Court of Appeals unwittingly excluded "retroactively tainted" evidence, is unsound, for it is an unintelligible way to characterize what occurred in this case. More basically and importantly, such a characterization is altogether unnecessary. The Court of Appeals' opinion is perfectly sensible on its own terms, without reference to the seemingly perverse notion of "retroactive taint," which, the government says, would lead to unacceptable results in other cases.[12] The fruit that the Court of Appeals suppressed came into being after, rather than before, the illegality, and its link to the illegal arrest depends on no sweeping "prosecutive utility" theory such as the

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the extent that the police "possessed" Owens' "ability", they also "possessed" complainant Denner's "ability." Yet she was never able to positively identify respondent as her assailant. Does this mean that her "inchoate ability" did not constitute "evidence"? Or that it was "evidence", but the respondent is not the right man? Or does it mean that there is something inherently illogical about the government's attempt to equate "inchoate ability" with evidence?

[12]Cases decided by the District of Columbia Court of Appeals since its *en banc* decision in *Crews*, reveal that decision has not had the fearful consequences that the government foresees. *See United States* v. *Cunningham*, 391 A.2d 1360 (1978); *Douglas* v. *United States*, 386 A.2d 289 (1978) (decided while *Crews* was pending decision).

government describes. That fruit was not the witness' pre-existing "ability to identify respondent," whatever that might be; it was instead the actual in-court identification that she made at the respondent's trial. This fruit is no different in principle from numerous other fruits heretofore always thought suppressible. If the government's mode of analyzing this case were adopted generally, then the exclusionary rule doctrine would need to be rewritten from the ground up.

The most obvious and typical example of evidence that, on the government's imaginative analysis, could never be subject to suppression, would be criminal proceeds. An illegally arrested accused could never succeed in suppressing the proceeds of a theft that had been seized from his person incident to that arrest. Such suppression would, by the government's lights, amount to the suppression of the complaint's ability to testify. Surely if Owens' "ability to identify" her assailant was "evidence available" to the police here, then so, too, would be the complainant's "ability to identify" his own property. On the government's theory, the arrest would merely link this previously acquired "evidence" to the defendant and would provide an opportunity for the complainant to identify the property from the witness stand. There, as here, suppression would involve the imputation of "retroactive taint."

For similar reasons, under the government's theory, the same defendant could never suppress testimony of a police fingerprint expert that the defendant's known prints matched latent prints found on the illegally seized proceeds. That expert's ability to testify, based as it would be on his prior training and experience,

existed before the illegal seizure. There, more clearly than here, this ability was already in police "possession." The police misconduct should, if the government is correct, be seen as merely "giving prosecutive utility to evidence already possessed by the police," and the exclusionary rule should not be applied, lest Pandora's box be opened.[13]

In fact, under the government's novel theory, virtually any case in which the suppression of tangible evidence is sought should now, it would seem, be viewed as involving a "retroactive taint."[14] This would be so of cases involving proceeds, other property which witnesses might link to the crime, or evidence which can be linked to the crime by some kind of scientific analysis. In all such cases, suppression of the challenged evidence deprives the prosecutor of the use of other pre-existing "inchoate evidence" as well.

The present case no more involves "retroactive suppression" than any of the above examples, which

[13]Similarly, if the government's theory were correct, then *Collidge* v. *New Hampshire,* 403 U.S. 443 (1971), and cases involving similar kinds of evidence were decided on grounds that are in fact beside the point. At issue there was the admissibility of vacuum sweepings taken from the defendant's car, which matched similar sweepings from the clothing of a murdered girl. *Id.* at 496 (per Black, J.) From the government's perspective, this should have been an easy case; for the Court should have recognized that Coolidge was in fact seeking the "retroactive" suppression of the previously acquired sweepings from the victim's clothes. The later seizure of his car, whether legal or not, merely lent this other evidence its "prosecutive utility." No member of this Court, however, advanced such a construct as a basis for the decision.

[14]Even the illegal seizure of contraband, such as drugs, might result in the "retroactive taint" of an expert's pre-existing ability to identify it as such.

are, of course, representative of cases in which, for years, the courts have applied the exclusionary rule without loosing the brood of horribles that the government now conjures up. Indeed, *Davis v. Mississippi*, 394 U.S. 721 (1969), which the government attempts to turn to its own advantage, is arguably closer than the present case to what the government would call a case involving "retroactive taint." In *Davis*, this Court, suppressed fingerprints illegally obtained from a criminal defendant, and thus rendered substantially useless not merely an "inchoate ability," as the Court of Appeals did here, but pre-existing tangible evidence, namely latent fingerprint impressions left at the crime scene, as well.[15]

[15]A comparison of this case with *Davis* also highlights another point. In neither case will the evidence that is subject to the purported "retroactive suppression" necessarily remain "suppressed" forever. Contrary to the normal use of the term "suppressed," the possibility remains open that Owens, at a new trial, will be able to exercise her purported ability to identify her assailant if by then an independent source, in the Fourth Amendment sense, can be shown for that identification. Gov. App. 42a, n.31. Similarly, the prosecution in *Davis* could make relevant use of the latent print at a new trial, provided that it had a set of Davis' prints that were untainted by Davis' illegal arrest. Thus it is not very useful to view *Davis* as involving suppression of a latent print taken from a crime scene. It is no more useful to characterize the present case, as the government does, as one involving suppression of "Owens' ability to identify respondent as her assailant." Brief, at 11. *Davis*, in fact, involved suppresion of an illegally obtained set of inked prints; this case involves suppression of the specific identification of the respondent which occurred at his trial.

Thus, respondent disputes the government's effort to read *Davis* as somehow sanctioning the in-court identification that took place in this case. It derives that reading principally from this Court's discussion, at 394 U.S. at 725 & n.4, of the D.C. Circuit case,

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In *Davis*, the defendant's prints, like respondent's photograph here, were obtained during an illegal investigative arrest. *Id.* at 726-28. Federal Bureau of Investigation fingerprint technicians determined that those prints matched the latent prints left on the window of a rape victim's home. *Id.* at 723. When this Court ordered the set of prints obtained from the defendant suppressed, it not only rendered any potential expert testimony useless, but it also stripped the latent prints themselves of their prosecutive utility, at least at a trial where the only set of the defendant's known prints which the state introduced were those that had been illegally seized. To be consistent, the government should view *Davis* as a case involving the "retroactive" suppression of this previously acquired

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Bynum v. *United States*, 262 F.2d 465 (D.C. Cir. 1958). The *Davis* court, as the government correctly observes, notes there that Bynum, whose first conviction was reversed because of the admission of illegally obtained fingerprints, was retried and convicted on evidence that included "another set of fingerprints in no way connected with his unlawful arrest. . . ." *See* Brief at 24, n.9. From this observation in *Davis*, the government argues that the in-court identification here should have been allowed. But the government simply ignores the crucial words in the passage that it cites–that the second fingerprints were "in no way connected" with the prior illegality. The implication of this discussion in *Davis* is thus that, had the second set of prints in fact been connected to the original illegal arrest, then the second conviction might have been infirm as well. Here, an unbroken and unattenuated causal chain linked respondent's illegal arrest with Owens' subsequent in-court identification. Indeed, the government has never suggested the existence of any untainted evidence. This is precisely why the Court of Appeals was correct in holding that that identification should have been suppressed.

tangible evidence.[16]

Thus, when the government contends that the Court of Appeals' ruling clashes with principles established in analogous cases from this Court, the conflict is imagined, not real. Whatever conflict might exist between this Court's prior holdings and the bogeyman of "retroactive taint" that the government has now created, in this case the Court of Appeals assiduously applied this Court's prior teachings to reach the correct result. Only from the perspective of the conceptual

[16]In fact, on the government's theory, *United States* v. *Ceccolini*, 435 U.S. 268 (1978), should have been resolved on the basis of "retroactive taint." In *Ceccolini*, a police officer while speaking socially with a shop cashier, casually examined an envelope belonging to the woman's employer. The envelope contained evidence of a gambling operation. Its discovery prompted the officer to question the woman about her knowledge of her employer's gambling activities. This Court held that the woman's subsequent testimony about those activities should not have been suppressed as the tainted fruit of an illegal search of the envelope. The Court acknowledged a causal connection between the search and the discovery of the woman's testimony, but it found that connection to be attenuated. Yet on the government's theory, *Ceccolini* should instead have been viewed as involving a "retroactive taint." For even before the search, the woman's identity was known to the police, and she was accessible; the search only caused the officers to realize her significance as a witness. But the Court did not decide the case on the grounds that the government urges here, namely that "taint" should never be imputed "retroactively." Instead, it applied normal attenuation analysis and found the causal link to be too weak. Moreover, this Court suggested that its analysis might well be different if the police illegality was motivated by the hope of discovering the identities of potential witnesses. 435 U.S. at 276, n.4. The Court of Appeals took precisely the same approach, in this case, and rightly concluded that here the evidence was not attenuated.

thicket where the government's search for "retroactive taint" has led it can it seem that the Court of Appeals has sanctioned immunity from prosecution in the guise of suppression of evidence, in conflict with *Frisbie v. Collins*, 342 U.S. 519 (1952), and *Ker v. Illinois*, 119 U.S. 436 (1886). *See* Brief at 20-22. As the government acknowledges, the Court of Appeals itself utterly disclaimed any such intention. Gov. App. 11a-16a. The government contends, however, that this disclaimer aside, the logic of its decision would inexorably lead to just that result; for, it says, here as in *Ker* and *Frisbie*, the only connection between an illegal arrest and the later use of previously acquired evidence is that the arrest "is what makes that evidence useful and leads to its presentation at trial." Brief at 22. Thus, according to the government, the logic of the Court of Appeals' decision would lead to the suppression of all the previously acquired evidence against a Ker or a Collins, and hence to the functional equivalent of immunity from further prosecution.

But as the respondent has already stated, this case does not involve the suppression of previously acquired evidence in any meaningful sense. The nexus here between the police misconduct and the challenged evidence is completely different and far more direct than the nexus in *Ker* and *Frisbie*. For here the police, when they arrested the respondent, had nothing approaching probable cause; only after the arrest, when they obtained the respondent's photograph, did they have the basis for a facially legal arrest. In *Ker* and *Frisbie*, the only challenge was to the mode of arrest, forcible abduction from a foreign jurisdiction—the pre-existing evidence already in police hands was not

merely sufficient to establish probable cause, but to establish guilt. What this distinction demonstrates is this: before the respondent here was arrested, the evidence he now challenges did not even exist. Only on account of that arrest did it come into being. This is the connection, missing in *Ker* and *Frisbie*, that led the Court of Appeals to conclude that the in-court identification here was indeed the fruit of the prior police misconduct.

Finally, the government points to *United States v. Wade*, 388 U.S. 218 (1967), and identification cases in that line. It does not attempt to revive the argument it made below, which was disposed of by the Court of Appeals, that the subjective "independent source" test fashioned in that case should be transplanted to Fourth Amendment soil,[17] but it argues instead that the

[17]The respondent will not repeat all of the points that the court made in its analysis of the question. Gov. App. 20a-24a. But the *Wade* independent source test, which seeks to determine whether the in-court identification is reliable, makes sense where the primary objective is reliability in the individual case, not deterrence. As this Court taught in *Manson* v. *Brathwaite*, 432 U.S. 98 (1977), in the Fifth Amendment context deterrence must be sacrificed when the cost is the exclusion of reliable evidence. Even from the perspective of deterrence, it would be illogical, on Fifth Amendment grounds, to suppress a reliable in-court identification that preceded it. What that exclusionary rule seeks to prevent is not all police efforts to obtain identification evidence, but only such efforts that might yield unreliable identifications. To exclude a reliable in-court identification would, accordingly, inflict a penalty altogether out of proportion to the wrong committed.

In the Fourth Amendment context, deterrence is, of course, the "primary justification" for excluding evidence, *Stone* v. *Powell*, 428 U.S. 465, 486 (1976). Reliability is not merely secondary, but is altogether beside the point. *Davis* v. *Mississippi*, *supra*, 394 U.S.

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Court's decision in this case would have untoward implications for that other body of doctrine. If an unduly suggestive or uncounseled identification occurs before trial, the government argues, it may well influence the authorities to prosecute. This decision, in turn, would cause a defendant to be brought to trial, when, because of the existence of an independent source in the *Wade* sense, an in-court identification might take place. Yet, according to the government, the connection between the in-court identification and the prior illegality that occurred here is no more substantial than the analogous connection in such an example. Hence, the government says, suppression here would require suppression in such a situation as well, and thus would conflict with *Wade*. Brief at 26-27.

This argument is, evidently, a rebottling of the argument already discussed; it proceeds from the same misunderstanding of the connection that in fact exists between the respondent's illegal arrest and Owens' later in-court identification. That arrest did not merely bring

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at 724-24.

The government's effort in the Court of Appeals to offer one protection—the Fifth Amendment independent source test—as a substitute for Fourth Amendment protections developed with altogether different considerations in mind is like the unsuccessful effort of the state in *Brown* v. *Illinois*, 422 U.S. 590 (1975), to offer *Miranda* warnings as a substitute for Fourth Amendment protections. The effort was rebuffed, for "to admit petitioner's confession in such a case would allow 'law enforcement officers to violate the Fourth Amendment with impunity, safe in the knowledge that they could wash their hands in the procedural safeguards of the Fifth.' " *Dunaway* v. *New York*, ___ U.S. ___, ___ (1979). Yet the government's argument from *Wade* would permit an analogous result here.

about, in the diffuse way[18] that the government hypothesizes in its example, the occasion for previously acquired evidence to be used against him at trial. It was instead, the direct, unattenuated cause of that evidence coming into existence.[19] Moreover there is no reason whatever to suppose that even if the Court of Appeals perceived this diffuse relationship, it would impose an exclusionary sanction. Indeed, it is clear that it would not; for in rejecting the government's argument that a Fifth Amendment independent source broke the causal chain here, the Court of Appeals discussed and relied upon the different objective of the two amendments. *See* n. 17, *supra.* In light of those objectives, an exclusionary sanction for reliable evidence because of suggestivity would be counterproductive, whatever the relationship of that suggestivity to the decision to prosecute.

Whether or not previously acquired evidence might ever be suppressed because of subsequent police misconduct, this case simply does not present that question.[20]

[18]Actually, it brought it about in no way at all. The finding of a Fifth Amendment independent source for the identification, implies that even absent the suggestiveness of the pre-trial procedures, the witness would have made the same identification. Hence we know, in retrospect, that the decision to prosecute was not influenced by the suggestive nature of those procedures.

[19]Again, this is what distinguishes this case from *Ker* and *Frisbie.*

[20]Though an intriguing question it may be. Certainly cases might be imagined where retroactive suppression would make sense on deterrence grounds, as, for example, where the police make a dragnet arrest to find the person who fits the clothes found on the murder scene; or barge into every house in town to find the person who dropped the wallet at the scene of the government's

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It is neither necessary nor useful to strain, as does the government, to recast this case in the mold of "retroactive taint." It is unnecessary, because the decision of the Court of Appeals is perfectly intelligible when taken at face value, and the case analyzed as one involving the suppression of a piece of evidence, the in-court identification, that did not come into being until after the respondent's illegal arrest. And it is not useful to recast

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hypothetical burglary. (Brief at 37). The government's principal argument on this point appears to be that it will prove to be impossible to draw meaningful lines to separate those cases from others where suppression would be senseless. It aserts that if the door is opened to a single "retroactive taint" case, however sensible suppression might be in that case in terms of exclusionary rule policy, it will prove impossible to keep a parade of horribles from marching through afterwards. The reason, it says, is that attenuation analysis will prove an inadequate guard at the door. The government may be exaggerating the difficulty, however, If the illegality is egregious, but it only gave prosecutive utility to evidence lawfully acquired previously, it might be both reasonable, and appropriate, not to suppress that evidence, but to suppress the "utility" of it derived from the illegality. For example, the government might be permitted to introduce the legally seized clothing, but not to demonstrate in court that they fit the defendant. Moreover, it is difficult to see why the government thinks its hypothetical burglary case is so illuminating. If "suspects" were rounded up in dragnet fashion to find someone who matched the burglary, the case is, in truth, no different from *Davis,*.

It might be appropriate to suppress the government's use of the photograph at trial as matching evidence unless it can show that the match was being made as a result of untainted evidence. This is analytically the same as what this Court did in *Davis*. It is certainly not at all self evident why attenuation analysis cannot be meaningfully applied to such cases.

the discussion that way, because if this case should be labeled as involving "retroactive taint," then so too should the vast majority of ordinary, unremarkable suppression cases.[21]

[21]It is interesting to speculate how it is that the government came to spin out this wondrous, but analytically useless concept of "retroactive taint." Perhaps it was developed as follows: After *United States* v. *Ceccolini*, 435 U.S. 268 (1978), it is no longer possible to make a head-on attack, and argue that the Court of Appeals was wrong simply because it suppressed testimonial evidence of a willing witness. Moreover, if the admissibility of testimonial fruits really is to be resolved by the application of conventional exclusionary rule principles, at this Court held in *Ceccolini*, it is difficult to find fault with the Court of Appeals' analysis. Hence, the flank attack. Somehow it must be shown that the evidence suppressed here is different in kind form that which was at issue in *Ceccolini*. Perhaps something can be made of the fact that here the police knew that the witness had potentially useful information before the misconduct occurred. Unfortunately, however, that would make no real difference because the in-court identification testimony which the Court of Appeals suppressed as a fruit obviously came after the misconduct. Calling that identification testimony an "ability" to give such testimony helps, because that ability did precede the misconduct. But, then, Mrs. Hennessey's "ability" to testify as she did in *Ceccolini* also pre-existed the police misconduct there, and the Court clearly did not decide the case on that ground. But if what is suppressed is called an "ability" to make an identification, and if an "inchoate ability" can be said to be "evidence" in the "possession" of the police prior to the misconduct, then this case can be distinguished from *Ceccolini*. Since this distinction has no functional meaning, it better have a sinister and beguiling name. *Voila*, "retroactive taint."

II.

THE SUPPRESSION OF OWENS' IN-COURT IDENTIFICATION IS NECESSARY TO DETER THE KIND OF BAD FAITH AND PURPOSEFUL POLICE MISCONDUCT THAT OCCURRED IN THIS CASE; MOREOVER THAT IDENTIFICATION WAS AN UNATTENUATED FRUIT OF THAT MISCONDUCT.

A. Deterrence.

In its discussion of the deterrent effects that suppression in this case would be likely to have, the government concedes that suppression of Carol Owens' in-court identification would yield "some incremental incentive" for the police to obey the Fourth Amendment. Brief at 31. But it then tries to minimize this increment by shifting attention from this case and focusing instead on "retroactive taint" cases as a class, contending that "there remain significant disincentives to unlawful arrests of suspects in the hopes of matching them to witnesses or other evidence already known." Brief at 31-36. This may be so where the "known" evidence points to a particular suspect, for then the police will not want to chance losing additional evidence against him by making an illegal arrest or illegal search. But this is surely not so where, as here, all the police "knew" was the name of a witness who might have an "inchoate ability" to identify an unknown suspect.

Indeed, this very case typifies a class in which there are not only no "significant disincentives to unlawful

arrest," but there are no disincentives at all.[22] The question here, then, is not how far the courts should go in enforcing the exclusionary rule to create such disincentives, but whether they should, by opening their doors to allow the state the benefits of official lawlessness, create positive incentives for illegal searches and seizures; for unless the identification evidence challenged here is suppressed, the court's message to the police is that they have much to gain and nothing to lose by again stepping outside of the law and making bad faith, purposeful investigative arrests when faced with similar situations in the future. This is not a case where suppression of evidence results in a criminal going free because the constable blundered. No police mistake here will cost the government the benefit of some evidence that it would otherwise have obtained. If the police had not arrested the respondent illegally, as they did, there would have been no pre-trial or in-court identifications to suppress. If the police had respected the limits that the Fourth Amendment sets to their conduct, and refrained from making an investigative arrest of respondent, they would have been left empty-

[22] Even if it were true that such disincentives existed, and they do not, this observation would not carry the government very far. For it could as well be made of any arbitrarily selected category of evidence such as, for example, firearms or statements: so long as only certain kinds of fruits are immune from suppression, the knowledge that other potential fruits are not, will provide an adequate deterrent to illegal police conduct. Since, as respondent has shown, no principled distinction can be drawn between the evidenced suppressed here, and that suppressed in a host of other fruits cases, to exempt it from the coverage of the exclusionary rule would be capricious. It would also be wrong as a matter of Fourth Amendment policy.

handed.[23]

In other cases, the police may have a choice of two equally available routes, one legal and the other not, to the same evidence. They may decide to proceed with a warrantless search, when, in fact, a warrant should and could have been obtained. Suppressing but a part of their gains will then exact a meaningful penalty. Their choice of the expedient course of conduct will have cost them evidence that they would otherwise have acquired, a fact that may argue for restraint in the application of the exclusionary sanction.[24] But here, if the police are not deprived of the benefit of all of the fruits of their lawlessness, they and other officers confronting similar circumstances will have substantial reason to act lawlessly again when no legal means to pursue their investigation seem open.

[23] This is evident from the facts. It is also implicit in the finding of the Court of Appeals that the government had failed to demonstrate that the respondent's photograph would have been "inevitably discovered" by lawful means. Gov. App. 35a. And it is well to remember that had there been no illegal arrest, and had this case not arisen, then the constraints of the Fourth Amendment itself and not of the exclusionary rule would be responsible. Thus, the respondent here seeks no windfall. The Court of Appeals' decision puts the respondent no better off than if his constitutional rights had been properly respected in the first place.

[24] This is not to say that the exclusionary rule is not appropriately applied where the police do have equally available routes to pursue their investigation. It is where the police have lawful alternatives available to them that the *threat* of the exclusionary rule can be expected to work most effectively to channel their actions toward those alternatives. Thus the rule should "work", and therefore have to be applied infrequently. But it may also "work" if applied less rigorously. This is not so here.

Furthermore, the conduct here was purposeful in the most important sense of the word. The challenged evidence which the police obtained is precisely the evidence they were after when they decided to make an illegal arrest. As the Court of Appeals noted, "Crews was intentionally subjected to an investigatory arrest for the very purpose of obtaining identification evidence." Gov. App. 48a. This is, therefore, the sort of case where the suppression remedy, if it reaches to the in-court identification as well as to the other fruits of the illegal arrest, can be expected to be most efficacious–but only if it reaches that far. "The prohibition of the exclusionary rule must reach such derivative use if it is to fulfull its function of deterring police misconduct." *United States v. Calandra*, 414 U.S. 338, 354 (1974). Thus, the government has it backwards. It is the *incremental* incentive that is large. The incentive for the police to obey the law, when to disobey will still yield substantial net profit, is relatively small. What Judge Friendly said in *United States v. Edmons*, 432 F.2d 577, 584 (2d Cir. 1970), could as well be said here:

> [I]n a case like this, where flagrantly illegal arrests were made for the precise purpose of securing identifications that would not otherwise be obtained, nothing less than barring any use of them can adequately serve the deterrent purpose of the exclusionary rule.

Yet to support its view that but scant deterrent value will be gained if the in-court identification is suppressed, the government does little more than attempt to point to alternative disincentives that, it says, might deter such investigative arrests in the future. These

alternative disincentives are not only inadequate in this case, but are so vaporous as to barely exist.

The "significant alternative disincentive" to unlawful arrests, the government maintains, is, primarily, the potential exclusion of "traditional" fruits, to wit, statements, tangible evidence, and pretrial identifications "*produced* by the arrest." Brief at 32 (emphasis supplied). To begin with, it is absurd to suggest that in a case such as this, the potential suppression of non-identification evidence could provide any significant deterrence at all. It is as though the state in *Dunaway v. New York*, ____ U.S. ____ (1979), had argued that even though the police unlawfully arrested the suspect precisely in order to question him, the statements they elicited need not be suppressed, because the "threat" that tangible evidence of the crime serendipitously found on his person would have been excluded provided a "significant disincentive" to the misconduct. Moreover, where, as here, such unsought fruits as statements or tangible evidence could not even conceivably have been obtained by the police absent the illegal arrest of the respondent, this argument is even more ridiculous, for the threat of "losing" what would otherwise not be found, is, of course, no disincentive at all. Even potentially suppressible evidence is better than no evidence at all.

The government also suggests that a significant disincentive is provided by the potential suppression–realized at the trial here–of evidence of pre-trial identifications. As with the suppressibility of unsought fruits, however, this is a non-existent disincentive; if the police had not made the investigative arrest, there would have been no pre-trial identification, suppressible or otherwise.

Moreover, even the suppression of all pre-trial identifications is of little, if any, benefit to the criminal defendant who is identified in court. Concommitantly, the potential exclusion of such identifications does not provide a disincentive to the police who contemplate making an investigative arrest with the hope of obtaining a conviction based on identification evidence. The impact of an in-court identification on a jury is far greater than the government seems to imagine. This case itself well illustrates the point: the respondent was convicted on the basis of such evidence alone.[25] From the standpoint of the prosecution, the out-of-court identifications may well be redundant, once the courtroom identification is allowed. Indeed, the Court recognized this fact, in *United States v. Wade*, 388 U.S. 218, 240 (1967), when it noted that it is often the defense that must itself bring out evidence of pre-trial identifications, as the only available means to attack or

[25]The government suggests that respondent's acquital on the January 6 robbery shows that there are disincentives when the government cannot introduce out-of-court identifications to bolster in-court identifications. However, in that case, contrary to the government's assertion, only one—not both—of the January 6 victims made pre-trial identifications of respondent, and there were discrepancies in the descriptions the witnesses to that robbery had given. Moreover, the respondent testified to an alibi for the January 6 robbery, and his testimony was corroborated by another defense witness. This evidence, not the government's inability to bolster its in-court identification, doubtless accounts for the jury verdict. After all, that same jury convicted him of the January 3 robbery on the basis of a single, uncorroborated, in-court identification.

impeach a postive in-court identification.[26]

Moreover, .on the government's theory that suppression of the in-court identifications is in reality the imputation of "taint, retroactively," to evidence that the police had acquired before their misconduct, respondent can find no way to distinguish between Owens' pre-trial lineup identification of respondent and her subsequent in-court identification of him. And the government never suggests a distinction. Indeed, it never addresses itself at all to the lineup identification, but rather, contrasts only the photographic identification which the government concedes is a traditional fruit, with the in-court identification which, it contends, is not.[27] If it is the government's unstated position that

[26]Furthermore, although the government does not address this point, the respondent would venture to say that in a case where only the out-of-court identifications were excluded, the government might well argue that a vigorous defense effort to discredit the in-court identification would open the door to the introduction of evidence of nonsuggestive pre-trial identifications, even if the defense had not alluded to them, under a principle of curative admissibility, analogous to the doctrine of *Walder* v. *United States*, 347 U.S. 62 (1954). Any deterrence would then be lost altogether. The fruits of the police misconduct would thus remain suppressed only so long as the defense mounted no challenge to the identification evidence that was admitted.

[27]It is respondent's positions, of course, that the in-court identification is as much a suppressible fruit of the illegal arrest as the photographic identification. The government, it seems would distinguish the photographic identification on the illogical basis that the photograph of the respondent which was actually displayed to the victim was secured during an illegal detention. But, clearly, on the government's theory of "retroactive taint" evidence of the photographic identification should not be suppressible either; for Owens' "ability to identify" the

(continued)

the testimony of the lineup identification is admissible then its suggestion that the potential exclusion of pre-trial identifications provides a substantial disincentive in cases such as this, is disingenuous, for surely the suppression of the photograph identification alone would in no way diminish the strength of the government's case at trial.[28] On the other hand, if it is the government's position that the lineup identification was properly suppressed, this cannot be squared with its general theory of "retroactive taint."

As we have seen, then, the "alternative disincentives" hypothesized by the government as adequate to deter the police prove to be illusory in cases such as this where the officer acted in bad faith and his very purpose in making the illegal investigatory arrest is the hope of securing identification evidence, and where there is no equally available way for them legally to

(footnote continued from preceeding page)

photographic image pre-existed the respondent's arrest in the same sense that her "ability to identify" his corporeal being did. And the film used to take the respondent's picture surely had the "ability" to reproduce his likeness before he was arrested. Hence the photographic identification, too, could be suppressed only as "retroactively tainted". Whatever sophistical distinctions the government can draw with respect to that identification, the lineup identification, like the in-court identification, was secured only after the respondent's re-arrest. Consequently the lineup identification cannot be distinguished from the courtroom identification on any basis at all. This may be why the government ignores the point.

[28]In *Gilbert* v. *California*, 388 U.S. 263 (1967), which the government cities as recognizing the significance of evidence of pre-trial identifications to the government's case, this Court referred only to lineups as "enhancing the impact" of the in-court identification. Moreover, in doing so, it in no way disparaged the impact of the in-court identification itself.

accomplish this purpose.[29] Because in such a case the in-court testimony falls squarely within the "offending officer's zone of primary interest,"[30] its exclusion—and only its exclusion—will significantly deter such police misconduct by eliminating the incentive to act lawlessly.[31]

[29]At one point in its brief, the government argues that because the police officers here "believed their actions to be lawful" the knowledge that in-court identifications could be suppressed "would not have effected their conduct." Brief at 33. The argument's premise is clearly erroneous; both courts below found that the police knew they lacked probable cause when they arrested respondent and thus were acting in bad faith. Even if this premise were true, it would be irrelevant in those Fourth Amendment contexts where the application of the exclusionary rule turns on an objective, not a subjective, standard. *See, e.g., Scott* v. *United States*, 436 U.S. 128, 135-127 (1978). This is as it should be, for even if officers acting in good faith cannot be deterred by the exclusionary rule, its application can be expected to induce police departments generally to try to inculate their members with an understanding of constitutional constraints. *See Stone* v. *Powell*, 428 U.S. 465, 492 (1976). In this particular case, involving a portion of a witness' testimony as a putative derivative fruit, the good or bad faith of the police officers is a factor that should bear heavily on attenuation analysis. *See United States* v. *Ceccolini* 435 U.S. 268 (1978). The Court of Appeals' opinion quite properly factored in the officer's bad faith and found that it tipped the balance in favor of exclusion.

[30]*United States* v. *Janis*, 428 U.S. 433, 458 (1976). *See also United States* v. *Ceccolini*, 435 U.S. 268, n.4 (1978).

[31]As the Court of Appeals put it:

> We reject the notion that mere suppression of the photographic and line-up identification testimony would somehow be an adequate deterrent sanction in this case. This conclusion could only result from the untenable assumption that a sufficient disincentive results when the police are prohibited from enjoying some, but not all, of the products of their wrong. Gov. App. 52a.

B. Attenuation.

It is not until page 45 of its brief that the government stops flailing away at the "retroactive taint" theory of which the Court of Appeals decision is said to be an unwitting example, and confronts that decision on its own terms, arguing that even if "Owens' testimony can be considered a fruit" of respondent's illegal arrest, "established principles of attenuation (as best they can be applied),[32] supports its admission." As the Court of Appeals correctly concluded, however, established principles of attenuation analysis show no such thing. Indeed, consideration of those principles highlights the propriety of suppressing Owens' in-court identification. It is precisely because the causal nexus between the police misconduct and the challenged fruit is so clear that the government is unable to establish attenuation.

In *Brown v. Illinois, supra*, this Court identified three factors which could usefully be considered in determining whether a statement of a suspect obtained by the police after his illegal arrest, is a suppressible fruit of that arrest. Those factors–temporal proximity, intervening event, and the character of the illegality–make eminent good sense in the context of *Brown*, where the issue was whether the suspect's statement was "sufficiently an act of free will to purge the primary taint

[32]Even here, the government will not quite let go of its doctrinal crutch.

of the unlawful invasion."[33] If the statement follows close on the heels of the illegal arrest, then it is more likely to have been the product of it.[34] Conversely, there may be certain events which occur between the arrest and the statement–intervening circumstances–which make it more likely that the statement was not generated by the misconduct but, rather, was sufficiently a product of the suspect's free will. Finally, the nature of the police misconduct is relevant to the suppressibility of a statement in two ways. First, if the arrest is made in a particularly heavy-handed or brutal way, then a statement is more likely actually to have been induced by it, and it is more likely that such a statement is what the police were after. Second, if the illegal arrest is made purposefully and in bad faith,

[33]The concepts of independent source and attenuation, in many cases, intersect and overlap. Indeed, they are frequently used interchangeably by courts. It seems, however, that independent source analysis is directed toward determining whether, in the words of *Wong Sun* v. *United States*, 341 U.S. 471 (1963), the challenged evidence was "come at by exploitation" of the Fourth Amendment violation. If it was not, then it is less likely that the misconduct was directed toward obtaining such evidence. Even more importantly, it is simply felt to be inappropriate to exclude evidence that was in fact produced by the illegal arrest in no more than a "but for" sense. Attenuation analysis, on the other hand, is directed toward determining whether the evidence obtained was an intended or forseeable consequence of the police misconduct. If it was, then the deterrent purposes of the exclusionary rule will be furthered by its application. On the other hand, if the evidence was an unanticipated by-product of the illegality, then its suppression will probably have little deterrent effect on future police conduct.

[34]Temporal proximity may sometimes also be relevant in determining the intent of the police when they committed the misconduct. Where the statement is obtained quickly, it is more likely that it was a foreseen and intended consequence of the misconduct.

then, it is the kind of misconduct that is more readily deterrable,[35] and no matter how decorously the arrest is made, it may nevertheless be appropriate to apply the exclusionary sanction.

Obviously, the three factors relevant in *Brown* may have greater or lesser significance in other settings, with other putative fruits, as *Ceccolini, supra*, shows. The issue in *Ceccolini* was whether the testimony of a witness, whose knowledge of criminal activities came to the attention of law enforcement authorities as a consequence of an illegal search, should be suppressed. Given the nature of the challenged fruit, the Court concluded that a fourth attenuation factor, the willingness of the witness to testify, was the most relevant indicator of attenuation:

> The greater the willingness of the witness to freely testify, the greater the likelihood that he or she will be discovered by legal means. And, concomitantly, the smaller the incentive to conduct an illegal search to discover the witness. . . . Witnesses can, and often do, come forward of their own volition.

Ceccolini, supra, 435 U.S. at 276.

But, of course, the factors identified in *Brown* and *Ceccolini* can not be mechanistically applied to other contexts. This is why the government's wooden attempt to apply them here founders. But its difficulty has nothing whatever to do with "retroactive taint." It

[35]Even good faith but illegal arrests are sometimes deterrable. The exclusionary sanction may be usefully applied to such arrests to induce police departments to sensitize their members to Fourth Amendment concerns. *See* n.29, *supra*. Where the arrest is made in good faith, however, it may be appropriate to apply the sanction less rigorously.

arises because the misconduct here was a purposeful investigative arrest with a specific fruit in mind.

Temporal Proximity. Temporal proximity has no bearing here. This is not, however, because, as the government contends, "[temporal proximity] can have no meaningful role to play . . . [w]here evidence is not a product of the search, being already in the possession of the police." Brief at 48. Rather, temporal proximity has no "meaningful role" to play here because the investigative purpose of the police misconduct is crystal clear, and the respondent's photograph unquestionably flowed from it. Since there is no question but that the very purpose of the police was to use that photograph to obtain an in-court identification, that benefit was obviously foreseeable no matter how long it was in coming.

Intervening Events. Events occurring between the time of the police misconduct and the development of the challenged evidence may reveal that the evidence was not in fact generated by—"come at by exploitation" of—that misconduct. Where this is so, suppression is felt to be inappropriate. An "intervening event" may also be relevant to show that the evidence obtained was an unanticipated and unforeseeable consequence of the police misconduct. Suppression in those cases is likely to be an ineffective deterrent.

The government contends that "the absence of a meaningful cause-effect relationship here between the illegality and the subsequent discovery of evidence diminishes the utility of this factor in the attenuation analysis." Brief at 49. This is nonsense. There are no significant intervening circumstances here which would establish attenuation simply because the challenged

evidence, Owens' in-court identification, was unquestionably the intended consequence of the purposeful police misconduct. There might, however, have been an "intervening event" which constituted an independent source for the challenged evidence. If the government had shown that it was legally obtained, untainted, evidence which brought about the opportunity for an in-court identification, then that identification would have been permissible.[36] But the government has never even claimed that there is such evidence.[37]

The government does suggest, however, that there was one significant intervening event—the trial court's finding of a Fifth Amendment independent source for the in-court identification—"not specifically addressed" by the Court of Appeals. The government contends that

[36]The magistrate's lineup order and finding of probable cause based on legally obtained evidence established just such as independent source in *Johnson v. Louisiana*, 406 U.S. 356 (1972).

[37]It is only the in-court identification by Owens at the respondent's trial that was held to be a suppressible fruit. It was not, as the government would have it, her ability to make an identification that was suppressed. Nor, of course, was Owens herself suppressed as a witness. No evidence is permanently tainted. If at any time, before or after the respondent's trial, the government could show that it had sufficient untainted evidence to bring the respondent to trial, then an identification could have been made. If, as a practical matter, such as independent source is not likely to be found in a case like this, then the resulting social cost is no greater than the often invisible cost society pays when the police, as they should, obey the Fourth Amendment. The inability of the police to find an independent source means only that, had the police not flouted the limits that the Fourth Amendment sets on their conduct, they would never have acquired any evidence against the respondent, and, indeed, there would never have been any trial.

this "event" supports a finding of attenuation in the present case because when the police officers arrested the respondent they could "have no assurance" that such a finding would be made by the trial court. Brief at 49.

It is not surprising that this "intervening event" was not addressed by the Court of Appeals, for it was not alleged to be one. At all events, the government's argument here is but a feeble appendage to its argument from alternative disincentives, cloaked in attenuation verbiage. It amounts to this: because the police could not be certain that they would succeed in acquiring the evidence they sought to obtain through their investigative arrest, the evidence that they do obtain where they succeed, thereby tends to be attenuated. The government might as well have said that the fact that the police "had no assurance" that Owens would be able to identify respondent's picture tends to "attenuate" any identification that she does make.

Moreover, the trial court's determination that the witness had an independent source for her in-court identification, properly analyzed, is not an intervening event at all. The witness' opportunity to observe, which is the practical cornerstone to a finding of "independent source," either existed, or did not exist, *prior* to the illegality. The trial court's finding of "independent source," in other words, was merely a judicial interpretation of facts that existed days before the illegality itself. Indeed, it is doubtless precisely because the police thought, from the witness' own account of the robbery, that she might be able to identify her assailant, that they believed that an investigative arrest to obtain photographs would prove

useful.[38] This illegality, in other words, not only presupposed, but was motivated by, the officer's hope that the witness could make an identification. It is absurd to suggest that the same factor that motivated the illegality in the first place, the witness' opportunity to observe, also constituted an "intervening event" to break the causal chain between the illegality and the fruit.

Moreover, even if the focus is on the trial court's ruling rather than its factual foundation, the ruling is still not an unanticipated event.[39] In virtually every case where the police make an illegal arrest it is conceivable that a trial court may find the fruits of that arrest irrelevant, or too prejudicial, and thus inadmissible at trial. To say, however, that a trial court's finding of legal relevance of illegally seized evidence is a significant attenuating event because the police could not be sure such a finding would be made, is casuistry.[40]

[38]To be sure, the government does not assert that this one factor alone should lead to a finding of attenuation. To the extent that it relies on this factor, it is, however, advocating an open invitation to police to conduct arrests to obtain identifications wholly without regard to the existence of probable cause, just as the state advocated with respect to illegal arrests for interrogations in *Brown* v. *Illinois, supra. See* Brief at 53, n.30.

[39]In the District of Columbia, at least, there are no reported cases where either trial courts or appellate courts have found that an in-court identification proffered by the government lacked an "independent source."

[40]Indeed, as the respondent had mentioned in Part I of this brief, p. 25, n.17, *supra,* this argument is but a relabeling of the argument that was made and convincingly refuted in the Court below that the *Wade* independent source test can somehow substitute for Fourth Amendment protections that have been fashioned with altogether different considerations in mind.

Free Will of the Witness. The government avers that "the Court of Appeals did not examine this consideration, although *Ceccolini* dictates that it be considered." Brief at 49. The government then goes on to beat the same old drum: because this case involves a "retroactive taint," "it is more difficult to know how to weigh the factor of free will in the analysis." Brief at 50, n.27.

The Court of Appeals did "examine this consideration" at some length, however, and explained why, in a case such as this, the free will of the witness is simply irrelevant. Its discussion has nothing whatever to do with "retroactive taint":

> More particularly, as to this last, "free will" variable, we note that in *Ceccolini* the witness was discovered as a result of the illegal search. Suppression of her testimony, however, would not have served the deterrent purpose of the exclusionary rule, for the policeman at the flower shop could not have perceived the eventual reward of that witness' testimony from his unlawful look inside the envelope. As the Court indicated in *Brown v. Illinois, supra* at 610, the rationale for recognizing a witness' free will as a significant attenuating variable is that "the police normally will not make an illegal arrest [or search] in the hope of eventually obtaining such a truly volunteered statement."
>
> In *Ceccolini*, however, the Court "reject[ed] the Government's suggestion that we adopt what would in practice amount to a per se rule that the testimony of a live witness should not be excluded from trial. . . ." *Id.* at 1059. The present case is a clear example of why such a per se rule would compromise the Fourth Amendment. Here, the witness could never have volunteered an identification of Keith Crews of her own free will, absent

> the unlawful arrest and photograph. Her in-court identification was premised on this critical link to Mr. Crews illegally acquired by the police. Thus, in the present case, the significant result of the unlawful police activity was not discovery of the witness (who was already known and ready to testify); it was the tangible evidence that made her initial identification, as well as her eventual in-court identification, possible. The police had every reason to anticipate that if they could obtain a photograph of the assailant, by any means, identification by a ready witness would quickly follow. Accordingly, the free will of the witness in the present case does not represent an attenuating, intervening force. To the contrary, unless the exclusionary rule is applied in this case, an important deterrent would be relaxed; an incentive would be created for illegal arrests and searches in the hope of finding tangilbe evidence to facilitate identifications by known witnesses. Gov. App. 51a-52a, n.37.

Surely the government is not suggesting that *Ceccolini* dictates that the free will of the witness be taken into account even where it is manifestly irrelevant. This is not to say, however, that courts should not be sensitive to the costs of excluding testimonial evidence when they determine the issue of attenuation.

The Character of the Fourth Amendment Violation. As the Court of Appeals recognized, this Court has identified the nature of the illegality as the most important single factor in attenuation analysis. This is because, as the government itself acknowledges, this factor is most pertinent to the primary objective of the exclusionary rule—the deterrence of future police mis-

conduct.[41] This factor can itself be divided into at least three aspects, and the government's discussion is flawed by its failure to distinguish between them. First, the misconduct may be "flagrant" in the sense that it is carried out in a brutal, or unnecessarily heavy-handed way; or it may be "flagrant" in the related, but distinct, sense that it is clearly unlawful, *e.g.*, an arrest based on evidence that does not even approach probable cause. Second, the misconduct may be "willful" or in "bad faith," in that the officers knew that what they did was unlawful. And third, it may be

[41] The government begins its discussion of this factor with an observation that betrays a fundamental misunderstanding of legal causation:

> The attenuation factor that is least distorted by the absence of a conventional cause-effect relationship between the police misconduct and the challenged evidence concerns the character of the violation, in terms of its purpose and its flagrancy. In largt [sic] part that is because this factor is pertinent not so much to the effort to identify the strength of the nexus between the violation and the evidence as to more general considerations of exclusionary rule policy.

Brief at 50.

This suggests that "the strength" of a causal "nexus" has some abstract meaning and that these other factors of analysis enable us to determine this "real" strengh. But we do not decide whether there is a "strong causal nexus" just by looking very hard at the facts. Once there is a "but for" connection, the question whether legal consequences should attach to it, *i.e.*, in this context, whether it is attenuated, can only be answered from some perspective. We "ascribe" cause if we think that doing so will advance our objective—here, deterrence—at a reasonable cost. All the factors of attenuation analysis are intended to help us answer this same question. The fact that they may not be revelant in some contexts does not indicate that there is no "real" causal connection, but only that in those contexts they have nothing to do with deterrence.

"purposeful" in that the challenged evidence is what the police were after when they violated the Fourth Amendment.[42]

In its brief, the government's argument takes this form: First, the misconduct here was not terribly serious:

> In short, the reasons for the detention were substantial, the intrusion on respondent's constitutionally protected interests was relatively limited; and nothing in the circumstances of the case supports an inference that the officers were acting in willful disregard of what they understood to be their lawful authority. Brief at 52 (footnote omitted).

Second, "the court of appeals did not disagree with" this characterization of "the circumstances of the detention," therefore it suppressed the in-court identification solely because it concluded that the arrest was made for the purpose of obtaining the challenged evidence. This was wrong, the government concludes, because "most Fourth Amendment violations are prompted by investigative purpose" and so "a consideration solely of purpose will have the effect of eliminating the attenuation analysis in almost all cases." Brief at 53.

In each of its premises the government is mistaken. To begin with, the Court of Appeals found that the "reasons for the detention" were not substantial—indeed, the Court found that the arrest was flagrant. The information known to the police when they arrested the respondent—that he bore a "minimal

[42]The relevance of these considerations is likely to depend, in part, on the nature of the challenged fruit.

resemblance" to a very "general description" and "might" have been in the area of the Washington Monument at some time on the day of a robbery six days before—was woefully short of probable cause. And the "intrusion on respondent's constitutionally protected interests" was not insubstantial. He was transported to police headquarters, and searched, photographed and fingerprinted. In all, he was forcibly detained for well over an hour. Finally, and most importantly, while the government may find "nothing in the case to support an inference" that the police acted in bad faith,[43] the Court of Appeals clearly did, and drew just such an inference:[44]

[43]There is a certain irony to the government's suggestion that if the arresting officers had read "some of the recent decisions of the District of Columbia Court of Appeals," they would have been "doubly surprised" that their conduct "violated the Fourth Amendment." (Brief at 50-51, n.28) Not one judge of that same Court, sitting *en banc*, read those decisions as justifying the police officers' conduct. Even for the dissenters, there was "no question but that" the officers acted unlawfully. Gov. App. 58a.

[44]The government argues that the officer's belief that the respondent may have been a truant somehow supports the reasonableness of the investigative arrest. Brief at 52, n.29. But, of course, their attempt to cloak the real purpose of that arrest with talk of truancy cuts just the other way, for it shows that the police realized that they did not have probable cause to arrest for robbery. The Court of Appeals did not treat this as a sham or pretext arrest case because, it concluded, the police went ahead and actually arrested for robbery anyway even though they knew that they did not have probable cause to do so. It did factor the sham aspects of the arrest into its determination that there was bad faith, however. Gov. App. 44a-45a, n.32. Indeed, it is the "bad faith" quality of this arrest that separates it from the run-of-the-mill arrest without probable cause.

The remarkable parallels to the offending police activity in *Brown v. Illinois, supra*, are noteworthy. In that case, as in this,

> [t]he impropriety of the arrest was obvious; awareness of that fact was virtually conceded by the two detectives when they repeatedly acknowledged, in their testimony, that the purpose of their actions was "for investigation: . . . The detectives embarked upon this expedition for evidence in the hope that something might turn up. [Id. at 605 (footnote omitted).]

Thus the government is wrong when it says that the Court of Appeals agreed with its characterization of the facts and ordered suppression only because the arrest was purposeful. On the contrary, the Court clearly found that the arrest was made in bad faith; that is, that it was an investigative arrest, in the sense that the police fully realized they did not have sufficient evidence for an arrest, but made it anyway, in the hope of developing such evidence.

The government suggests that because virtually all police misconduct is directed toward some investigative end, it is not useful to consider "purposefulness" in attenuation analysis. This, too, betrays a misunderstanding of the Court of Appeals' opinion. Obviously, "purposeful" misconduct is not being used by the Court of Appeals to denote all misconduct undertaken for some purpose or other. Rather, it is referring to misconduct specifically directed toward obtaining the evidence challenged as its fruit. As the Court of Appeals said in summarizing the nature of the illegality which it found to have occurred here:

> The scenario which emerges from this testimony is unambiguous: [respondent] Crews was intentionally subjected to an investigative arrest for the very purpose of obtaining identification evidence. (Gov. App. 48a.)

It is clear, then, that there are many cases where application of the exclusionary rule may be inappropriate or ineffective simply because the challenged evidence was discovered unexpectedly, as for example, where evidence is uncovered with respect to one offense, upon an arrest for another or, simply, was not the evidence the police were specifically after when they made the unlawful arrest.[45] And it may also be inappropriate to apply the exclusionary rule as vigorously where the police believe in "good faith" that they have probable cause. But, conversely, where, as here, the challenged evidence is precisely the evidence which the police were after when they calculated that it would be worth their while to act unlawfully in order to obtain it, both purposefulness and bad faith exist, and it will be difficult for the government to show attenuation. This, of course, is how it should be, for it is precisely here that the exclusionary rule is both most efficacious and most necessary.

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[45]The Court of Appeals distinguished its prior decision in *Bond* v. *United States*, 310 A.2d 221 (1973), and two United States Court of Appeals' decision, *Payne* v. *United States*, 294 F.2d 723 (D.C. Cir. 1961), and *United States* v. *Reid*, 527 F.2d 380 (2d Cir. 1975), on just that basis. Gov. App. 53a, n.38.

III.

THIS COURT SHOULD NOT CARVE OUT AN EXCEPTION TO THE COVERAGE OF THE FOURTH AMENDMENT EXCLUSIONARY RULE FOR THE TESTIMONY OF THE VICTIM OF A CRIME.

In part three of its brief, the government asks this Court to rule that the reliable testimony of the victim of a crime should be exempt from the coverage of the exclusionary rule no matter how egregious the police misconduct that produced it. In other words, it asks this Court to announce that even where the police make wide ranging, dragnet arrests, or conduct broad, general searches, they will be permitted to reap the fruits, so long as those fruits can be translated into the form of victim testimony.[46] Since in many cases the ultimate and foreseeable benefit to the police of such misconduct, is, of course, just such testimony, the message to the police contemplating such sweeping arrests or general searches would be clear indeed.

This Court has never conveyed such a message

[46]The government proposes that the exception should be for the testimony of victims that is "reliable and independently based." Brief at 56. But it never explains what this means, and "independently based" is hardly self explanatory. In this very case, the Court of Appeals found that Owens' in-court identification was not "independently based." Indeed, this was, of course, its reason for excluding it. If the government is suggesting a Fifth Amendment test of "independent basis," then under such a test the victim would be permitted to identify and testify about illegally seized tangible evidence such as weapons or stolen property. If the government does mean to undo in this way what has heretofore been unquestioned Fourth Amendment doctrine, it should say so directly.

before. Where it has declined to extend the suppression sanction, as, for example, to the use of illegally seized evidence in grand jury proceedings, *United States v. Calandra*, 414 U.S. 338 (1974), in civil cases, *United States v. Janis*, 428 U.S. 714 (1974), or for impeachment, *Oregon v. Hass*, 420 U.S. 714 (1975), it has done so in the confidence that the threat of suppression of the evidence's direct use in the criminal trial itself provided a sufficient deterrent to police misconduct. It has, wisely, never carved out an exception[47] to the exclusionary rule based on the kind of evidence illegally obtained.

The government argues that the Court should do so now because the "cost to society and the adverse impact on the administration of justice are too high to warrant the deterrent benefits, if any, of suppression of this kind of evidence." Brief at 56. But the "deterrent benefits" of exclusion are far from speculative. As the arrest here, and as the dragnet arrests in *Edmons, supra*, show, the police do commit bad faith, and flagrantly unlawful arrests with the goal of securing in-court identification at trial. Moreover, as respondent has shown, unless the in-court identification testimony is suppressed, the real incentive for such police misconduct remains.

Nor are the costs to society of excluding that portion of a victim's testimony which is directly produced by egregious official misconduct so great that it should be

[47]Not surprisingly, the government prefers "recognize" to "carve out"; but it neither cites any decisions of this Court that support its position, nor suggests any principles under which a victim's testimony is conceptually different from any other testimonial fruit.

admissible under a *per se* rule. Rather, the principles of attenuation analysis which this Court has carefully developed in such cases, as *Brown, supra*, and *Ceccolini, supra*, should be applied on a case by case basis with respect to a victim's testimony as well; for there is simply no principled basis on which to distinguish the testimony of an eyewitness from that of a victim.[48] Deterrence considerations are, surely, the same, and so are the social "costs" of suppression, for the exclusion of any evidence, testimonial or tangible, may make it impossible for the state to secure a conviction.

At the same time, however, it is certainly true that the exclusion sanction should be applied to a victim's testimony only where its propreity, and its likely deterrent effect, are clear. As this Court cautioned in *Ceccolini*, "since the cost of excluding live witness testimony often will be greater, a closer, more direct link between the illegality and that kind of testimony is required." 435 U.S. at 278. This may be especially true where it is a portion of the victim's testimony that is at issue. Where, as here, however, a court finds that the

[48]Having failed in *Ceccolini, supra,* to persuade this Court to adopt a broad, *per se* rule of admissibility for all testimonial evidence, the government now asks this Court to adopt a more limited version of such a rule which would not even have the virtue of establishing a bright line. For what, precisely, is a "victim"? Suppose the government charges a crime against several persons, some of whom prove at trial only to have been eyewitnesses; is their testimony suppressible as a fruit of police misconduct? If it is not, there will be an invitation to overcharge. If it is, the mechanics of suppression are at best unwieldy; for it may not be until the jury verdict that the putative "victim" is found not to have been one after all. Moreover, there are many crimes whose victims are hard to identify; and ironically, for the most serious crime of all—murder—there is, of course, no victim to testify.

link is both close and direct because it finds that there was a flagrant and bad faith arrest intended to develop the very identification testimony challenged as its fruit, the suppression sanction should be available to it. While the application of the exclusionary rule does, of course, always involve a social cost, this is really a cost our society has chosen to bear in the interest of protecting those rights secured by the Fourth Amendment itself. There would be a far more perilous price to pay if this Court were to declare "... that the government may commit crime in order to secure the conviction of a criminal."[49] This Court has never done so before, and it should not do so now.

[49]*Olmstead* v. *United States,* 277 U.S. 438, 485 (1928), Brandeis, J. dissenting.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectively submitted,

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